

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Jayne B.  
Khalifa, Acting Commissioner,  
Department of Human Rights,

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER

Complainant,

vs

City of Hibbing, Public Utilities  
Commission,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on August 28, 1986 at the Office of Administrative Hearings, Minneapolis, Minnesota and on September 15, 16, 17 and 18, 1986 in the St. Louis County Courthouse, Hibbing, Minnesota. The final post-hearing brief was received on December 9, 1986 at which time the record closed.

Carl M. Warren, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Human Rights. Richard E. Prebich, from the firm of Abate, Wivoda, Clark & Prebich, Attorneys at Law, 704 E. Howard Street, P.O. Box 329, Hibbing, Minnesota 55746, appeared on behalf of the Respondent, Hibbing Public Utilities Commission.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69,

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Hibbing Public Utilities Commission discriminated against the Charging Party, David A Fena, when it disqualified him from employment because of a perceived back condition.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. David A. Fena is a 44-year-old male (date of birth 12-31-42) who resides in Hibbing, Minnesota. Mr. Fena attended Hibbing High School, graduating in the spring of 1961. While in high school, Fena participated in four years of football, four years of track, three years of wrestling and two years of basketball.

2. After graduation from high school, Mr. Fena worked part-time for S & S Auto Parts in Hibbing doing janitorial work and stocking shelves. His responsibilities included lifting car batteries and stocking auto parts shelves.

3. Mr. Fena entered the Navy in January of 1962 and was initially sent to the Naval Training Center in San Diego, California for boot camp. At boot camp, Fena engaged in strenuous physical activities which were designed to improve his fitness.

4. Mr. Fena's first assignment following boot camp was in July of 1962 when he was sent to the Naval Training Center in Memphis, Tennessee for schooling in aviation structural mechanics. His first duty assignment was in the fall of 1962 through 1967 when he was attached to the Naval parachute facility in El Centro, California. Fena was a member of the aircraft check crew and was specifically responsible for the assembly, disassembly, removal and inspection of ejection seat, air conditioning, pressurization, oxygen and canopy systems. Additionally, his responsibilities included removing, packing and installing personnel and cargo parachutes. Most of this work was strenuous manual labor which included lifting equipment weighing up to approximately 100 pounds. In addition to these work activities, Fena actively participated in volleyball and baseball during his four years at El Centro.

5. In 1967, Mr. Fena was transferred to the Naval Station in Kodiak, Alaska. His initial assignment was with the Station Master-at-Arms, a detachment charged with keeping law and order on the base. This job lasted only a few months. His next assignment at the Kodiak station was as a parachute rigger and aviation structural mechanic. He performed those duties from 1967 through 1970. Mr. Fena was an assistant shop supervisor and was responsible for maintaining all of the aircraft survival gear, including Arctic survival gear, parachutes, aircraft interiors, life rafts, emergency life raft systems and aircraft fire extinguishing systems. All of this work involved lifting and was strenuous manual labor. In addition to those tasks, Fena was a loadmaster for a C-54 cargo aircraft. Consequently, it was his responsibility to load and unload the aircraft on a daily basis. While at Kodiak, Fena played volleyball and intramural baseball on a regular basis and participated in JFK physical training programs.

6. Mr. Fena's next assignment was at the Naval Air Station in Glenview, Illinois from 1970 to 1974. He was attached to the liquid oxygen farm which was primarily responsible for converting liquid oxygen and nitrogen into gaseous oxygen and nitrogen and distributing it throughout the base. In performing this job, Fena had to lift and move metal cylindrical containers weighing approximately 100 pounds. Additionally, Fena had the responsibility to service jet aircraft that had liquid oxygen converters. While performing this function, Fena had to lift and move 80-pound converters without

assistance. Mr. Fena was also responsible for removing and installing aircraft ejection seats and canopies. This was strenuous manual labor which involved lifting weights up to 100 pounds. In addition to work activities, Fena played baseball and intramural touch football at Glenview.

7. Fena's next assignment was a three-year tour of duty from 1974 through 1977 aboard the aircraft carrier U.S.S. Midway. One of Fena's jobs aboard the U.S.S. Midway was working in the mechanical shop which was responsible for the egress and environmental control systems aboard the aircraft. This job involved the same physical labor to remove, maintain and reinstall ejection seats and canopies that he had done at the Glenview base. Fena's duties on the flight deck included securing aircraft with chocks and chains. These chocks and bags of chains would have to be carried around the aircraft by Fena and the other members of the crew. Performing work duties aboard the ship involved climbing and descending ladders, oftentimes while carrying tools or parts. While aboard the U.S.S. Midway, Fena continued to participate in physical fitness activities and qualification exercises.

8. Fena's final tour of duty, beginning sometime in 1977, was at the Naval Weapons Center in China Lake, California. During this assignment, Fena performed many supervisory functions and after a promotion to Chief Petty Officer, his job became relatively sedentary. Prior to 1977, Mr. Fena had never experienced any back pain or back injury during any of his work or other physical activities. He never missed any time from work due to any back problem.

9. While serving at China Lake, Mr. Fena began to experience difficulties and pain in his lower back. These difficulties continued through 1979 when Mr. Fena sought treatment from naval medical staff. At this time, a back x-ray was taken. The radiologist's report states that:

There is bilateral spondylolysis of L5 with a grade I spondylolisthesis of L5-S1. There is also disk space narrowing at the level of L5-S1 noted.

The examining physician, Captain R. W. Taylor, stated in his report that Mr. Fena had spondylolysis at the L5-S1 area, but he did not see "any true spondylolisthesis." Additionally, Captain Taylor stated that Fena was experiencing discomfort due to "very tight hamstrings" which was a "matter of

sciatica due to the tightness of his hamstrings . . . " Captain Taylor prescribed medication, physical therapy and exercises to treat Mr. Fena's back problems.

10. Spondylolisthesis is characterized by defects in the pars interarticularis (the bone that is the joint between the vertebra does not form) of the fifth lumbar vertebra and resultant anterior displacement of that vertebral body in relation to the first sacral vertebra. Spondylolisthesis is classified as Grade I, Grade II, Grade III or Grade IV depending on the severity of the anterior displacement of the fifth lumbar vertebra on the sacrum. In Grade I, the displacement is 25 percent or less of the diameter of the first sacral vertebra; in Grade II, between 25 percent and 50 percent; in Grade III, between 50 percent and 75 percent; and in Grade IV, greater than 75 percent. Most of the anterior movement of the vertebra occurs by the time an individual is 35 years old. When there are defects in the pars but no anterior displacement of the vertebra, the condition is called spondylolysis.

Sciatica is nerve root irritation where the nerve enters the spine and results in pain which radiates down one leg or the other.

11. In October of 1980, Mr. Fena again sought medical treatment because he reinjured his back while lifting the hood on his jeep. The examining physician prescribed a muscle relaxant and physical therapy. Fena was advised to avoid activities which would aggravate the back strain.

12. In April of 1981, Mr. Fena underwent a naval retirement physical and the examining physician noted "occasional back pain and sciatica now asymptomatic." Fena retired from the Navy on May 31, 1981.

13. In July of 1981, Mr. Fena applied for employment with the Hibbing Public Utilities Commission. On his application, Fena stated that he had had previous "back trouble" but it was a "lower back spasm (none recent)." Mr. Fena heard nothing from the Public Utilities Commission through the summer of 1981.

14. In August, 1981, Mr. Fena applied to the Veterans Administration for a physical examination to determine whether he had sustained a compensable disability while in the Navy. Fena underwent a physical examination, which included back x-rays, in September of 1981. The x-ray report showed a H grade I spondylolisthesis with spondylolysis at the L5-S1 level." Additionally, the radiologist noted a narrowing of the L4-L5 intraspaces. As part of the physical examination, Mr. Fena told the physician that his back had "gone out" four times since 1977 and a nerve was "pinched" during one episode. He stated that the last attack lasted a month during March of 1981 while he was at China Lake. Additionally, Fena related that his back would stiffen up after sitting for any length of time and would occasionally "go out", causing him to walk "hunched" over. Fena reported that he had to stop twice during the car ride from Hibbing to Minneapolis to get out and limber up.

15. Subsequent to the September, 1981 physical examination, the Veterans Administration determined that Mr. Fena's "chronic, recurrent back pain syndrome with a history of back strain" was "service-connected" but less than ten percent disabling and thus not compensable. This information was communicated to Fena by way of a letter dated January 20, 1982.

16. On January 26, 1982, the Hibbing Public Utilities Commission posted an opening for the position of Coal and Ash Man. Mr. Fena's July, 1981 application was considered for this position and Mr. Fena was ranked number one out of 300 applicants.

17. The position of Coal and Ash Man is a very strenuous, physically demanding manual labor position. Its main responsibilities are: (a) the removal of coal from railroad coal cars and breaking the chunks of coal into smaller pieces which will fit through a metal grate into a coal bunker; (b) to remove ashes from the boilers; and (c) carrying the ashes outside the plant for disposal. This job involves strenuous bending and lifting and the use of tools and equipment weighing up to 70 pounds. Metal bars and jack hammers

must be used in the winter to pry frozen coal out of the coal cars. This work must be done from ground level through a chute on the bottom of the car. Additionally, big chunks of coal ash, "clinkers", must be broken down for disposal. Barrels of clinkers weighing up to 200 pounds are required to be moved outside the plant for dumping.

18. Because Mr. Fena was ranked the number one candidate for employment, he was awarded the coal and ash position contingent upon the successful completion of a pre-employment physical and a 90-day probationary period. Mr. Fena met with David Strafaccia, Director of Finance and Personnel Supervisor for the Commission, and was given a pre-placement medical questionnaire to be filled out at home and taken to the pre-employment physical. On the questionnaire, Fena indicated that he had never had or been treated for "back strain." Fena did not indicate anywhere on the questionnaire that he had any history of back problems.

19. Dr. Charles W. Decker conducted the pre-employment physical examination of Mr. Fena on March 3, 1982 at the Adams Clinic in Hibbing, Minnesota. The examination consisted of a medical history, a physical examination and x-rays. Mr. Fena did not reveal his previous history of back problems in the Navy. After completing the medical history and physical examination, Dr. Decker concluded that Fena was medically "recommended for employment without restriction," and marked the Health Evaluation Summary form to indicate that conclusion. However, the following day after reviewing the x-ray report regarding Fena's lumbar spine, Dr. Decker changed his conclusion to recommend that Fena's employment be restricted so that it would not involve lifting over 30 pounds or repeated squatting or bending. The x-ray report stated that, "The lumbar spine shows a spondylolisthesis with anterior displacement of L5 on S4 [sic]." It was Dr. Decker's opinion that the condition of spondylolisthesis would subject Mr. Fena to a probable back injury if he were to assume all of the rigorous duties of the position of Coal and Ash Man.

20. After receipt of Dr. Decker's recommendations concerning restrictions on Mr. Fena's employment, Mr. Strafaccia telephoned Decker to discuss the limitations. Decker confirmed that the job restrictions were appropriate concerning the condition of Fena's back. Consequently, in a letter dated March 5, 1982, Mr. Strafaccia informed Mr. Fena that he would not be employed because of his Aback problem." After receiving this letter, Mr. Fena went to see Mr. Strafaccia concerning his rejection. At that time, Strafaccia encouraged Fena to go back to see Dr. Decker for a re-evaluation of his medical condition. Mr. Fena never went back to see Dr. Decker, however.



21. Another applicant was subsequently hired for the position of Coal and Ash Man by the Hibbing Public Utilities Commission.

22. During the summer and winter of 1981, Mr. Fena was employed in a labor position by the Range Septic and Sewer Service and as a plumber's helper with Northern Mechanical Services. Both of these jobs involved strenuous physical labor.

23. After his rejection by the Public Utilities Commission, Mr. Fena became self-employed as a furniture upholsterer on a full-time basis. He has continued to work in that capacity to the present. Much of his work in that business involves manual labor including bending and lifting heavy objects. In addition, Mr. Fena has cut eight cords of firewood each year for the past five years for his own use, has planted gardens each year, has worked planting trees, and has engaged in other recreational physical activities.

24. On August 5, 1982, David Fena filed a charge of discrimination with the Minnesota Department of Human Rights against the Hibbing Public Utilities Commission. That charge alleges employment discrimination on the basis of disability. Mr. Fena's sworn statement on the charge states that his "jobs with the U.S. Navy required heavy physical work and I never had any back trouble."

25. A Complaint on this matter was issued by the Minnesota Department of Human Rights on April 3, 1986. An Answer was filed by the Respondent on April 17, 1986.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. 363.071 and 14.50 (1982). The Minnesota Department of Human Rights gave proper notice of the hearing in this matter and it has fulfilled all relevant substantive and procedural requirements of law and rule.

2. David Fena's back condition, as perceived by the Respondent herein, constitutes a disability within the meaning of Minn. Stat. 363.01, subd. 25 (1982).

3. The Complainant has not proved a prima facie case of disability discrimination.

4. The attached memorandum is a part hereof.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### ORDER

IT IS HEREBY ORDERED that the Complaint herein is dismissed.

Dated this            day of January, 1987.

PETER C. ERICKSON  
Administrative Law Judge

Reported: Transcript Prepared by Janet R. Shaddix & Associates.

#### MEMORANDUM

Minn. Stat. 363.03, subd. 1 provides in part:

Except when based on a bona fide occupational qualification, it is an unfair employment practice:



(2) For an employer, because disability . . .

(a) to refuse to hire . . . a person seeking employment;

Minn. Stat. 363.01, subd. 25, provides:

"Disability" means a mental or physical condition which constitutes a handicap.

To establish a prima facie case of discrimination, the Complainant must prove: (1) that Fena applied for an available position with Respondent; (2) that he met the minimum qualifications required to perform the responsibilities of the position; and (3) that he was not hired in the position because of a perceived disability. State by Gomez-Bethke v. Metropolitan Airport Commission, 358 N.W.2d 432 (Minn. App. 1984); Danz v. Jones, 263 N.W.2d 395 (Minn. 1978); McDonell-Douglas Corporation v. Green, 411 U.S. 792 (1973).

There is no dispute that David Fena applied for a job with Respondent and that based upon x-ray findings of a condition of spondylolisthesis, his application was rejected. However, in order to complete the proof necessary to establish a prima facie case, Complainant must show that at the time the application was rejected Mr. Fena was capable of performing the job in question. Respondent may use evidence of Fena's medical condition discovered after the rejection to rebut the "capability" issue. See, Mantolet v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985); Daubert v. United States Postal Service, 733 F.2d 1367, 1372 (10th Cir. 1984).'

The record in this matter shows that David Fena experienced recurring back problems from 1977 through early 1981, just before he applied for a job with the Public Utilities Commission. Mr. Fena admitted to the VA doctor in the fall of 1981 that his back had "gone out" four times since 1977 and that the last episode lasted for a month in March of 1981. Although Mr. Fena attempted to minimize his previous back difficulties during his testimony, and testified about a long history of problem-free work activities prior to 1977 and Subsequent to 1981, there is sufficient reason to doubt his testimony. The record shows clearly that Mr. Fena did not fill out either his job application or pre-employment medical questionnaire truthfully, and that his charge filed with the Department of Human Rights contains an untruthful statement. Mr. Fena's actual history of back problems was not known to either party until long after discovery had commenced in this case.

Mantolite and Daubert arose under the Rehabilitation Act of 1973, 29 U.S.C.A. 701 et seq., which is the federal counterpart to the disability discrimination provisions contained in Minn. Stat. ch. 363. Both cases hold that evidence of an employee's medical condition discovered after a negative employment action is taken against the employee can be used to rebut the employee's prima facie case (specifically the employee's capability to do the job) but not to supplement reasons for rejection or termination.

The State's major contention in this matter is that Respondent's rejection of Mr. Fena's application, based solely on the fact that a condition of spondylolisthesis was found on the x-ray is, on its face, discriminatory. Both parties in this case agree that even if Mr. Fena does have spondylolisthesis, it is only Grade I with a slippage of ten percent or less. The Office of Administrative Hearings and this Judge have ruled in previous cases that a finding of Grade I spondylolisthesis, absent any history of back difficulties, does not constitute a bona fide occupational qualification or a "serious threat" defense. See, State v. U.S. Steel Corporation, HR-78-042-SM Decision issued October 23, 1980); State v. Inland Steel Mining Company, HR-81-007-PE (Decision issued April 20, 1983). However, neither of those cases involved a situation where the prospective employee had an "unrevealed" history of significant back difficulties. Most of the medical testimony in this case concerned the issues of whether Mr. Fena had true spondylolisthesis and, if so, whether he could have performed the job of Coal and Ash Man with that condition. These issues only need be reached if it is determined that a prima facie case has been established, however.

The Judge has concluded that at the time Mr. Fena was considered for the job of Coal and Ash Man with the Public Utilities Commission, he did not meet the minimal qualifications necessary for that job because of his previous history of back problems. The job of Coal and Ash Man was a very strenuous manual labor position which required heavy lifting, bending and working in awkward positions. The naval medical records show clearly that Mr. Fena experienced recurring episodes of back problems from 1977 through 1981. Medication, physical therapy and exercises were prescribed as treatment. Dr. Decker testified that this history should have been thoroughly evaluated if it had been revealed. Mr. Fena did admit, however, the seriousness of his back condition to the VA doctors in September of 1981. All of the doctors who testified in this case agreed that a prospective employee's previous history of back problems or trouble-free work activities is the best indicator of whether s/he can successfully do the job in question. Mr. Fena's history of back difficulties through 1981 is sufficient reason to determine that he was not capable to perform the strenuous job of Coal and Ash Man in early 1982.

Although the State's experts testified that Fena's history of back problems was probably nothing more than muscle strain, these evaluations were

many years after the difficulties had subsided and based on the history provided by Mr. Fena. The Judge discounts Mr. Fena's attempts to minimize these problems and his testimony of "trouble-free" job activities since 1981.

Mr. Fena's memory concerning the nature of his back difficulties was shown to

be faulty on several occasions during his testimony. See, Tr. Vol III, pp. 74, 77, 146, 149, 152 and 156. Additionally, the record shows that he gave untruthful information on at least three occasions concerning his back (application for employment, pre-employment medical questionnaire, and charge

of discrimination). Consequently, the Judge has concluded that Complainant

has failed to establish a prima facie case of disability discrimination and the Complaint herein must be dismissed.

P.C.E.